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ALEXANDER L. STEVAS,
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No. 80-1955

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARTER COUNTY FISCAL COURT, LOWELL "GENE" CLINE, Carter County Judge-Executive, as its Chairman;
CHARLES WILBURN, JAMES WILBURN, JOHN PENNINGTON, JASON BRADLEY, RICHARD SHORT, Individually and as Members of the Carter County Fiscal Court - Appellants

versus

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, as Trustees of the Carter County Public Library District, Individually and as Representatives of a Class - - - Appellees

On Appeal From the Supreme Court of Kentucky

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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v.

CARTER COUNTY PUBLIC LIBRARY DISTRICT, BOARD OF TRUSTEES, ROBERT L. CAUMMISAR, EDITH STROTHER, MYRTLE LEMASTER, JANIE QUALLS and SARAH LEWIS, as Trustees of the Carter County Public Library District, Individually and as Representatives of a Class - - *Appellees*

On Appeal From the Supreme Court of Kentucky

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Come the Appellants, Carter County Fiscal Court, Lowell "Gene" Cline, Carter County Judge Executive, as its Chairman; Charles Wilburn, James Wilburn, John Pennington, Jason Bradley, Richard Short, individually and as members of the Carter County Fiscal Court, by counsel, and in opposition to Appellees' Motion to Dismiss or Affirm, state the following:

Appellees in their Motion to Dismiss or Affirm raise the following claims:

(1) Failure of service;
(2) Failure to raise or present federal issues in state court;
(3) Insubstantiability of federal issues.

Appellants respectfully maintain that all of the foregoing allegations of Appellees are without merit.

I. There Has Been No Failure of Service Because the Parties Are Agents, Officers and Employees of the Commonwealth of Kentucky.

Appellees' contention that this appeal should be dismissed for failure to comply with Rule 28.4(c) is without merit. Said Rule by its terms is applicable only where "the state or any agency, officer, or employee thereof is not a party." Because of this clear exception within the rule, lack of service on the Attorney General does not constitute grounds for dismissal of the action.

Under Kenutcky law, "a county is but an arm or branch of the state government." *Monroe County* v. *Rouse,* Ky., 274 S. W. 2d 477, 478 (1955) following *Downing* v. *Mason Co.,* 87 Ky. 208, 8 S. W. 264 (1888). Counties in Kentucky constitute the "basic subdivisions of the Commonwealth." *Holsclaw* v. *Stevens,* Ky., 507 S. W. 2d 462, 475 (1974).

In this case, the Appellant, Carter County Fiscal Court, is a constitutionally prescribed office of the

Commonwealth of Kentucky, and the appellant members thereof are the holders of constitutionally mandated public office of the Commonwealth of Kentucky. (Constitution of the Commonwealth of Kentucky, §99 and §144.) Appellants' duties in the management of the County are set forth in KRS 67.080.

As a governmental body and as individual office holders of the Commonwealth of Kentucky, Rule 28.4 (c) is clearly inapplicable inasmuch as Appellants are agencies, officers, or employees of the State; as indeed are Appellees themselves as office holders of a statutorily organized taxing district of the Commonwealth of Kentucky under §157 of the Kentucky Constitution. [See KRS 173.470(3).] Appellees' arguments regarding service are thus clearly meritless under Kentucky law.

II. Appellants Clearly Raised and Presented the Federal Issue in State Court.

Although the Supreme Court of Kentucky indeed failed to address the Federal issues raised by Appellants, said issues have been clearly raised by them throughout this litigation. The proper raising of said issues below is detailed at pp. 7-8 of their Jurisdictional Statement, and especially in footnotes 6, 7 and 8 therein.[1]

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[1]e.g., Before the Kentucky Supreme Court, Appellants specifically argued:

"KRS 173.720 violates the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitu-

(Footnote continued on next page)

Despite the raising of such Federal issues, the Kentucky Supreme Court failed to rule thereon, apparently in keeping with its earlier pronouncement that "this court declines to entertain further constitutional attacks on KRS 173.710 through KRS 173.800." *Wayne Public Library Board of Trustees* v. *Wayne County Fiscal Court,* Ky., 572 S. W. 2d 858, 859 (1978).

III. The Federal Questions Are Substantial.

Appellees maintain (Motion to Dismiss or Affirm, pp. 4-8) that the Federal issues are insubstantial, claiming that the petition method of tax district creation "was as pure and direct participatory democracy as any could imagine," and analogizing the creation of the tax district in question to a New England town meeting. Appellees' attempt to so clothe the stifling of electoral participation with the robe of New England democracy is an ill-fitting cloak. As noted by the Supreme Judicial Court of Massachusetts in *Opinion of the Justices,* 229 Mass. 601, 607, 119 N. E. 778, 781 (1918):

> "The essential and distinguishing characteristic of the town meeting form of government is that

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(Footnote continued from preceding page)

tion of the United States, as well as the Equal Protection Clause.

. . .

"Attempts to limit political participation in the electoral process have consistently been viewed as violations of the due process requirements of the Fourteenth Amendment and the Equal Protection Clause of that Amendment." (Motion for Discretionary Review, No. 80-SC-690D, pp. 10, 12.)

> 'all the qualified inhabitants meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers.' (Citation omitted). Each qualified inhabitant of the town has an indisputable right to vote upon every question presented as well as to discuss it, or there is no town meeting."

It is the failure to accord such notice and such opportunity of electoral participation to all the qualified inhabitants who constitute the Carter County electorate which renders the challenged statutes repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[2]

Appellees' attempt to distinguish *Reynolds* v. *Sims*, 377 U. S. 233 (1964); *Avery* v. *Midland County*, 390 U. S. 474 (1968); *Hadley* v. *Junior College District*, 397 U. S. 50 (1970); and *Kramer* v. *Union School District*, 395 U. S. 621 (1969) on the basis that such cases dealt with elected officials amounts to a distinction without a difference. Any distinction which might exist inures to support Appellants' claims, rather than

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[2]Of the 11,000 registered voters described by Appellees in their Motion to Dismiss or Affirm (at p. 7), only 2,140 signed Appellees' petitions. The constitutional infirmity of Appellees' argument is readily apparent. If, as conceded in their Motion (at p. 6), "all registered voters who opposed the library system voted 'no' by the simple expedient of refusing to sign the petition when presented" and "even those several thousand voters who were not approached by the library supporters after the 51% *majority* had been obtained voted 'no'" (emphasis supplied), then it is evident that the 2,140 registered voters signing the petition are not in fact a 51% "majority" of the 11,000 registered voters of Carter County. Appellees do not even assert that a majority of such voters as much as had notice of the circulation of the petitions in question, much less an opportunity to participate in the process.

Appellees', because the statutes herein challenged do not deal with the mere election of those who will administer governmental power and hold governmental office. Rather, they circumvent electoral notice and participation in the more fundamental political decision concerning the very creation of such governmental power and office.

For the reasons heretofore set forth in their Jurisdictional Statement, Appellees respectfully submit that it is apparent that substantial Federal issues are herein presented.

CONCLUSION

The motion of Appellees to dismiss or affirm should be overruled, and the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Commonwealth of Kentucky
Jefferson County } SS

On this 14th day of August 1981, before me, a Notary Public for the State of Kentucky and Jefferson County, the undersigned Theodore H. Amshoff, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by first-class postage pre-paid mail, three copies of the Brief of the Carter County Fiscal Court on appeal from the Supreme Court of Kentucky to the following:

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Theodore H. Amshoff, Jr.

Sworn To and Subscribed before me the day and year aforesaid.

Notary Public, State at Large, Ky.